Filed 7/7/09 P. v. Lockler CA2/8

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JAMES EARL LOCKLER,<br><br>Defendant and Appellant. | B202381, B206138<br><br>(Los Angeles County<br>Super. Ct. No. NA067385) |

APPEAL from judgments of the Superior Court of Los Angeles County. Tomson T. Ong. Affirmed as modified.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Ellen Birnbaum Kehr, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * *

In case No. B202381, appellant James Earl Lockler appeals his conviction for four counts of criminal threats, four counts of false imprisonment, and one count of falsely reporting a bomb.[1] The appeal in case No. B206138 is from appellant's second sentencing hearing, after the trial court recalled the sentence pursuant to Penal Code section 1170, subdivision (d).[2] We previously consolidated the two appeals.

**PROCEDURAL HISTORY**

The nine-count first amended information was filed on June 9, 2006. The victims of the incident (the check cashing store incident) were three female employees and one female customer who were inside a check cashing store in Long Beach. For each of the women, the amended information alleged one count of criminal threats (§ 422) and one count of false imprisonment (§ 236). One of the women was also the victim on count 9, which alleged falsely reporting a bomb (§ 148.1, subd. (c)). Five prior strike convictions were alleged, all of which were violations of section 422 in 1999 in the same Santa Maria Superior Court case (the Santa Maria incident). Three prison priors were also alleged. They were (1) the five violations of section 422 in the Santa Maria incident, (2) one count of false imprisonment in the Santa Maria incident, and (3) a 2002 conviction in Los Angeles Superior Court for falsely reporting a bomb (§ 148.1, subd. (a)) (the hotel incident).

Appellant pled not guilty. The jury found him guilty on all counts.

On September 20, 2007, the trial court found the prior convictions true. It rejected appellant's oral request for dismissal of the strikes under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*). It sentenced appellant to prison for 231 years to life. That sentence was based on consecutive sentences of 25 years to life on all nine counts, plus 1 year pursuant to section 667.5, subdivision (b) and 5 years

---

[1] At various points in the record, appellant's last name is spelled "Lockler," "Locklar" or "Locklear." We use "Lockler," the spelling used on the information and judgment in case No. B202381.

[2] All statutory references are to the Penal Code unless otherwise stated.

pursuant to section 667, subdivision (a)(1). Appellant was awarded 730 days of actual credit and 58 days of local conduct credit. The court recommended that appellant "be housed at California Men's Colony, San Luis Obispo or Vacaville inpatient."

Appellant filed a notice of appeal, resulting in case No. B202381.

On November 5, 2007, the sentence was recalled pursuant to section 1170, subdivision (d).

Appellant returned to the courtroom for the second sentencing hearing on February 15, 2008. The prosecutor and defense counsel who tried the case were also in the courtroom. The court explained that the recall was motivated by "a desire to reconsider and re-visit issues for sentencing." It repeated the jury's verdict and its findings on the prior convictions. It stated, "I know that there was an extensive discussion as to his capacity at the time whether or not he should be sentenced." It asked defense counsel, Mr. Ma, if appellant was currently receiving the treatment he needed. Ma said he could not answer that question, but he knew that appellant had been examined by multiple doctors who believed he was competent to stand trial. Ma added that he would not have proceeded to trial if he believed appellant lacked competency. Also, he had talked to appellant before the day's proceedings, and appellant seemed to understand what was happening. The court's concern was whether appellant had been competent at the time of the first sentencing hearing. Ma said he had not raised those concerns in the past and was not raising them on this day. The court asked appellant if he had been sent to the prisons in Delano or Vacaville. Appellant answered no. The court found that appellant was competent at the second sentencing hearing, based on his responses to the court's questioning. It again imposed sentence. This time, it gave appellant 25-year-to-life sentences on all nine counts and a total of six years on the enhancements, but only count 9 was made consecutive to the other counts. The court recomputed appellant's credit for time served and again recommended that he be placed in the California Men's Colony at San Luis Obispo or in the Vacaville program.

On February 22, 2008, appellant filed a second notice of appeal, which resulted in case No. B206138.

## ISSUES PRESENTED

In case No. B202381, appellant contends that (1) the trial court erred in allowing Dr. Sharma to testify that, in his opinion, appellant was not legally insane at the time of the crime; (2) CALCRIM No. 3428 constituted improper comment on the evidence; and (3) the trial court should have stricken all but one of his prior strikes.

In case No. B206138, appellant contends that (1) the abstract of judgment and minute order for the second sentencing hearing must be corrected to reflect the court's actual sentence; (2) pursuant to section 654, appellant should have been punished only once for each "pair" of crimes; and (3) his conduct credits were improperly computed.

We find no prejudicial error in case No. B202381 but find merit in the issues raised in case No. B206138, which are partly conceded by respondent.

## FACTS

### *1. Prosecution Evidence*

On September 19, 2005, appellant walked into the check cashing store and asked to speak with the manager. He wore gloves and was carrying a backpack. The manager, Aida Lopez, was inside the store at that time with a female customer and two other female employees, Tasha Beetem and Tracy Thomas. Lopez, Beetem, and Thomas testified at the trial. Appellant told Lopez, "[C]lose the doors, I have a bomb, I'll blow you guys up." Lopez locked the door. Appellant held the four women hostage by pretending that he had a detonator in his hands, which he was going to use to blow up a bomb in the backpack. The events were partly recorded on the store's video camera, which produced a video that the jury watched at the trial.

Over the course of almost four hours, appellant repeatedly threatened to blow the women up. Conversely, he also said, a few times, that he did not want to hurt them. They were afraid to leave, as they believed he had a bomb. He never physically touched them, but he threatened to "snap [their] necks" and "slit [their] throats" if they did not comply with his orders. He sometimes made them kneel or sit down. He

forced all of them into the small room at the back of the store and told them to remove all their clothing. They were afraid he would set off the bomb, sexually assault them, or otherwise harm them. Two of them briefly took off all their clothes. He looked those two "up and down" and then let them put their clothes back on. He told them he had needed to check that they had nothing that would hurt him.

The women talked with appellant throughout the incident. They repeatedly asked him why he was holding them hostage. He told them he was schizophrenic and had been off his medication for five days. He said a sniper in the bushes across the street was watching him, he had been sent to the store to blow them up, and if he did not do that, "snipers would come to get him and his family." He kept his eyes averted from them and sometimes looked out toward the imaginary sniper.

Appellant gradually allowed three of the women to leave. He made his decisions in consultation with the manager, Lopez, who worked on convincing him that he would be treated more leniently by the authorities if he let hostages go and did not hurt anyone. Beetem was the first to leave, as she was physically ill. Appellant let the customer leave second because she had no involvement with the store. Thomas left third, after Lopez persuaded appellant that one hostage, herself, was enough. He told Lopez at one point that he "already had a record, and [the police] were going to shoot him if he went outside." He spoke with the police department's hostage negotiator on the telephone and sometimes let Lopez speak with the negotiator. He finally walked out of the store, leaving Lopez and the backpack behind. Police officers immediately arrested him and soon discovered that there was no bomb.

During the trial, appellant's defense counsel extensively cross-examined Beetem, Thomas, and Lopez on the extent of appellant's mental impairment.

Beetem testified that appellant talked to the four hostages, individually and as a group, and also mumbled to himself "a lot," as though talking to somebody who was not there. She thought he "seemed very schizophrenic" and confused. It appeared that "he was not in control of the situation" and he "didn't know what he wanted to do

next." He paced through the front and back rooms of the store and grew increasingly impatient and scared as time passed.

Thomas testified that she spoke with appellant herself, and saw him speak with the women as a group, but did not see him speaking to a nonexistent person. After the first two hostages left, she was still inside the store for another 45 minutes to an hour. She talked with appellant about her family, hoping that subject would convince him to release her. She asked him if he had a family. He said he did. He made little eye contact with her, but he understood what she was saying. He paced, looked out toward the sniper across the street, and said there were people in another city who wanted "vengeance against him."

Similarly, Lopez testified that appellant was able to talk with her throughout the entire incident, and she did not see him carrying on a conversation with himself or with a nonexistent person.

On the day after his arrest, appellant was interviewed at the jail by a police detective. The detective testified that appellant was "a little bit dazed but coherent" at the start of the interview and grew "more concentrated" as the interview progressed. He responded logically to questions. He cried and talked softly, but he made eye contact and did not appear to be responding to imaginary voices. He indicated that he was suicidal and felt like hurting himself. He knew he was "in a lot of trouble." He recalled going into the check cashing store. He said he did not know what happened inside, as he was off his medication at that time and was "hallucinating" and "hearing voices." He took hostages because the voices told him to do that. The voices also told him to kill the women, but he did not want to do that. He knew he did not have a bomb in the backpack. He let three of the women go after a voice told him to do that. At the end of the interview, he asked the detective to tell the women he was sorry.

The People also introduced evidence of the hotel incident, for the issue of appellant's intent. On May 24, 2002, appellant approached Leanor Pinon, the female security guard at a hotel in Long Beach. He told Pinon to "keep quiet . . . and just follow [his] orders," as he had a bomb in his tote bag. He also said he was suicidal and

was "sent by Bin Laden." He demanded a hotel room and a cell phone. He was calm and was not talking to imaginary people. Pinon took him seriously. She told a coworker what was happening and then let appellant into a hotel room. He asked her for the cell phone. She told him to wait inside the room while she got it. She left but soon returned to the hallway outside the room, accompanied by police officers. When appellant opened the door for her, the officers took him into custody.

***2. Defense Evidence***

Dr. Kaushal Sharma, an extremely experienced forensic psychiatrist, testified for the defense. He had been asked to evaluate appellant on the issue of competency to stand trial. In his opinion, appellant was competent if medicated. He interviewed appellant at the jail on December 20, 2006. Appellant was receiving psychiatric medication at that time. Sharma believed appellant "was okay" at that time because he was medicated.

Dr. Sharma had reviewed many documents that detailed appellant's mental issues. The documents came from a variety of psychiatric facilities and a regional center for the developmentally disabled, whose clients used to be called the "mentally retarded." Appellant was a client of the regional center and had a lengthy history both of mental illness and developmental disability. He had previously been diagnosed as having "mild mental retardation," with an IQ of 65 or 66, although Dr. Sharma thought the actual figure might be lower. The medical records also showed that appellant had a "schizophrenic disorder." Schizophrenic disorder is a common, serious and chronic form of mental illness that affects 1 percent of the adult population in the United States. It involves biochemical changes of the brain, which cause a person to become irrational and lose touch with surroundings. Its common symptoms include thinking one is someone else, hallucinating about hearing things or seeing things that are not there, and having a disorganized thought process. Medication helps some people with the disorder, but not others.

Dr. Sharma's direct examination concluded: "Overall I think he's got multiple diagnoses. I think he suffers from subnormal intellectual functioning, whether it's

65 or 66, it still puts him in a very lower range of the average population; number two, he suffers from a mental illness independent of the developmental disability, most likely schizophrenic, but in the past sometimes he has been given diagnos[is] of depression and bipolar. But I think the most likely diagnosis is schizophrenic disorder. [¶] And he has some additional problems, too. He has a personality disorder, he has a drug problem, and I think they contribute and kind of muddy up [*sic*] the diagnostic water because they all contribute to his peculiar way of thinking."

On cross-examination, over defense objection, Dr. Sharma testified that appellant was not legally insane at the time of the incident. On redirect examination, Sharma added that he believed appellant's mental illness played a role in his behavior. On recross-examination, Sharma said appellant was suicidal, and a person might try to kill himself by giving the police no other alternative than to shoot him. On further redirect examination, he stated that the fact appellant was suicidal further showed mental illness.

## DISCUSSION

### *1. Cross-examination of Dr. Sharma*

Appellant contends that the trial court committed prejudicial error when it allowed the prosecutor to question Dr. Sharma about Sharma's opinion that appellant was not legally insane at the time of the check cashing store incident. We find that the trial court erred, but there was no prejudice, on the facts of this case.

*A. Legal Background*

"When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed." (§ 1026, subd. (a).) If the jury finds the defendant guilty and the defendant entered a plea of not guilty by reason of insanity, "the question whether the defendant was sane or insane at the time the offense was committed" is then tried. (*Ibid.*) At the sanity trial, the defendant must prove "by a preponderance of the evidence that he or she was incapable

of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." (§ 25, subd. (b).)

Other than at a sanity trial, "[e]vidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, *when a specific intent crime is charged*." (§ 28, subd. (a), italics added.)

The parties agree that the only charged crimes that required specific intent were the criminal threats charges (§ 422), as section 422 expressly requires that the threat be made "with the specific intent that the statement . . . be taken as a threat."

"In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states . . . . The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." (§ 29.)

*B. The Record*

Appellant pled not guilty and did not plead not guilty by reason of insanity.

From the start of the trial, the jury knew the defense would contend that the crimes resulted from mental illness.

During the trial, there was extensive eyewitness testimony regarding appellant's mental state, plus Dr. Sharma's expert testimony that appellant was both schizophrenic and developmentally disabled.

On cross-examination, Dr. Sharma again indicated that, if medicated, appellant was competent to stand trial. The prosecutor's questioning continued:

> "Q Now, another way that mental illness interacts with the legal system is what we call the legal test o[f] insanity, correct?
>
> "A Yes.
>
> "MR. MA: Objection; not relevant.
>
> "MR. WEIMORTZ [the prosecutor]: It's completely relevant.

"THE COURT: Overruled."

During further cross-examination, Dr. Sharma indicated that a person who appeared insane to a layman might not meet the legal definition of insanity, which concerned whether the defendant understood the nature and quality of the act and knew that the act was legally and morally wrong. Sharma had been asked by defense counsel to determine both whether appellant was competent to stand trial and whether he was legally insane at the time of the incident. The cross-examination continued:

"Q Now, you actually formed the conclusion that at the time of the crime, he was not legally insane?

"A I did reach an opinion, yes.

"Q And that was your opinion, correct?

"A Yes.

"Q So it was your opinion, based on looking [at] all the records, interviewing him, that at the time of the crime, he understood the nature and quality of what he was doing?

"A I did believe that.

"Q And at the time of the crime, he was -- he understood that what he was doing was morally wrong and legally wrong?

"MR. MA: Objection. That's reserved for the jury.

"THE COURT: No, that's overruled.

"Q By Mr. Weimortz: Was that [your] opinion?

"A That was my opinion."

Dr. Sharma then gave multiple reasons for his opinion that appellant was not legally insane at the time of the crime. Among those reasons were that appellant was able to disobey the voice's command to kill the hostages, he had enough insight to tell the hostages he was schizophrenic and was not on his medication, he attempted to justify why he ordered the hostages to remove their clothing, and he told one of them that he had a previous record.

During closing argument, the prosecutor said that appellant unquestionably suffered from mental illness, but the jurors should convict him if they were convinced of his guilt and leave the subject of penalty to the judge. Appellant's mental

impairment was to be used only on the issue of whether he formed the requisite specific intent on the criminal threats counts. The prosecutor maintained that appellant had that specific intent, as he knew he was schizophrenic and was able to recognize that voices were telling him to kill people.

Defense counsel argued to the jury that appellant's behavior during the incident and his history of mental illness and developmental disability showed that he lacked the requisite intent for all of the crimes.

The prosecutor responded in closing argument that appellant's mental illness could be used only on the criminal threats counts, and appellant was not so mentally ill that he did not form specific intent. The argument included a reminder of Dr. Sharma's testimony that appellant was not legally insane and understood what he was doing.

*C. Analysis*

The trial court should not have permitted the cross-examination on whether appellant was legally insane at the time of the crime. Dr. Sharma's opinion on that issue was irrelevant during the trial of appellant's guilt, as the issue of sanity belonged at a sanity trial, and at the guilt trial, appellant was "conclusively presumed to have been sane at the time [of] the offense." (§ 1026, subd. (a).) Moreover, even if the issue had been relevant, at a trial of guilt an expert may not testify about whether or not the defendant had a requisite mental state, as that is an issue for the trier of fact. (§ 29; *People v. Smithey* (1999) 20 Cal.4th 936, 960-961.)

We further find that the issue was not waived, as defense counsel's initial relevancy objections were overruled, and further objections would have been futile.

It is not reasonably probable, however, that appellant would have received a different result on the criminal threats charges, in the absence of the erroneous rulings. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) On the four section 422 counts, the jurors had to decide whether appellant's mental illness and developmental disability meant he actually lacked the specific intent that his statements would be taken as a threat. Dr. Sharma described appellant's history of mental illness and developmental disability during his direct examination as a defense witness. The People were entitled

to cross-examine Sharma, although not on the specific issue of whether or not appellant was legally insane at the time of the crime. The jury heard that, during the hotel incident, appellant had previously committed a similar crime. It learned that, during the check cashing store incident, appellant repeatedly threatened to blow up the bomb in his backpack and also threatened to snap the hostages' necks and slit their throats. The evidence further showed that appellant was able to converse with the hostages and the hostage negotiator, knew he had a prior criminal record, and realized that he was schizophrenic and had not taken his medication. In view of the overwhelming evidence that appellant intended that his statements would to be taken as a threat, there was no possible prejudice from the erroneous rulings during Dr. Sharma's cross-examination.

***2. CALCRIM No. 3428***

The trial court gave CALCRIM No. 3428, "Mental Impairment: Defense to Specific Intent or Mental State (Pen. Code, § 28)," regarding whether appellant had the requisite specific intent on the criminal threats counts. Appellant complains about the first sentence of that instruction, which stated: "You have heard evidence that the defendant may have suffered from a mental disease, or defect, or disorder." According to appellant, the quoted language constituted improper comment on the evidence, in violation of his federal constitutional rights to due process, impartial trial by jury, and counsel, as protected by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. He maintains that the words suggested that he did not really suffer from a mental defect, which improperly told the jurors they should disregard or discount Dr. Sharma's testimony. The argument lacks merit, as we find nothing improper in the quoted sentence.

***3. Refusal to Strike All But One of the Strikes***

Under *Romero, supra,* 13 Cal.4th at page 504, *People v. Williams* (1998) 17 Cal.4th 148, 161, and *People v. Carmony* (2004) 33 Cal.4th 367, 376-380, a trial court may strike a defendant's prior strike convictions in the furtherance of justice, and its exercise of discretion is reviewed on appeal for abuse of discretion.

Appellant contends that, because his five prior strikes arose from the single incident in Santa Maria, and his criminal history did not otherwise compel such a lengthy sentence, the trial court abused its discretion when it refused to strike all but one of the five strikes.

The probation report and other documents regarding appellant's prior convictions showed that he was 24 years old when he committed the check cashing store incident on September 19, 2005. In 1999, when he was 17 years old, he was tried as an adult for the Santa Maria incident. That incident involved his entering a bank and holding five people hostage, over an extended time period, by pretending that he had a bomb in his backpack. He pled guilty to five counts of criminal threats and to one out of five charged counts of false imprisonment. He was incarcerated at the California Youth Authority from September 20, 1999, until his release on an unknown date. He committed the hotel incident on May 24, 2002. That incident, which was presented through the security guard's testimony at the trial of the check cashing store incident, involved appellant's obtaining a hotel room by threatening to blow up a bomb in his tote bag. He was committed to state prison for the hotel incident and was paroled on August 9, 2004. Meanwhile, his youth authority parole on the Santa Maria incident was revoked on November 12, 2002. He was again paroled on that case in January 21, 2005. The check cashing store incident occurred approximately eight months later.

Appellant told the deputy probation officer he was an alcoholic who smoked marijuana and previously, but no longer, used methamphetamine. He had suffered from mental illness for many years and was currently receiving medication in the psychiatric module of the jail. The probation report indicated that there were mitigating circumstances that meant the low base term might be appropriate. Appellant's mother also had mental problems. Appellant had been the victim of neglect and physical abuse as a child and was in the foster care system from the time he was nine years old. He was living at a board and care facility at the time of the check cashing store incident.

At the first sentencing hearing, appellant's counsel, Mr. Ma, asked the court to consider striking the strikes because of appellant's mental handicap, his history of hospitalizations for mental illness, the fact the five strikes in the Santa Maria case arose from a single incident, and the facts that, during his crimes, he never actually used physical violence or weapons on anyone and made threats that he could not carry out.

The prosecutor argued against dismissal of any of the strikes on the ground that, despite appellant's mental illness, he was a "continuing threat" who periodically repeated the same behavior.

The trial court found that appellant's repeated bomb threats showed that he had a history of violence. Appellant used the same modus operandi and picked women as targets. The court did not think appellant had any prospect of a law-abiding future, and it did not believe that his "mental issues" justified striking the strikes. It denied the *Romero* motion and then imposed consecutive sentences of 25 years to life on all nine counts, because there were multiple victims who "were impacted differently."

We are confident from this record that the trial court carefully considered its decision, was aware of its options, and did not abuse its discretion when it refused to strike any of appellant's prior strike convictions.

***4. Issues at the Second Sentencing Hearing***

If a defendant is convicted of two or more crimes, and the trial court does not make a timely decision whether the sentences are to run concurrently or consecutively, the terms must be served concurrently. (§ 669; *People v. Black* (2007) 41 Cal.4th 799, 822.)

The court's oral pronouncement of judgment controls over the abstract of judgment or the clerk's minute order. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Caudillo* (1980) 101 Cal.App.3d 122, 125.)

At the first sentencing hearing, as the trial court imposed a 25-years-to-life sentence on each count, it stated that the sentence on that count was "to run consecutive with," or "run consecutive to," the other counts.

The court subsequently recalled sentence pursuant to section 1170, subdivision (d), which permits resentencing of the defendant "in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence." Upon such recall of sentence, "[c]redit shall be given for time served." (*Ibid.*)

At the second sentencing hearing, the court explained that it recalled the sentence out of concern with whether appellant was competent at the first sentencing hearing. After finding that appellant was competent at the time of the second sentencing hearing, it sentenced him again. In orally pronouncing judgment, it did not mention consecutive or concurrent sentencing until it reached count 9. It made count 9 consecutive to the other counts, on the ground there were multiple victims.[3] It again imposed a total of six years on the enhancements and again recommended that appellant be confined in the California Men's Colony at San Luis Obispo or in the

---

[3] The court's exact words were: "There being no legal cause, let me resentence Mr. Lock[l]er. [¶] As to count 1 defendant is ordered committed to the Department of Corrections for a term of 25 years to life. [¶] As to count 2 defendant is ordered committed to the Department of Corrections for a term of 25 years to life. [¶] As to count 3 defendant is ordered committed to the Department of Corrections for a term of 25 years to life. [¶] As to count 4 defendant is ordered committed to the Department of Corrections for a term of 25 years to life. [¶] As to count 5 defendant is ordered committed to the Department of Corrections for a term of 25 years to life. [¶] As to count 6 defendant is ordered committed to the Department of Corrections for a term of 25 years to life. [¶] As to count 7 defendant is ordered committed to the Department of Corrections for a term of 25 years to life. [¶] As to count 8 defendant is ordered committed to the Department of Corrections for a term of 25 years to life. [¶] As to count 9 defendant is ordered committed to the Department of Corrections for a term of 25 years to life *and I'm going to run this consecutive to all counts*. The reason is there were multiple victims in the case. [¶] As to the special allegation under . . . section 667[, subdivision] (a)(1), the defendant is ordered committed to the Department of Corrections for a term of five years to run consecutive to all counts. [¶] As to the special allegation under . . . section 667.5[, subdivision] (b), the defendant is ordered committed to the Department of Corrections for a term of one year to run consecutive with all counts." (Italics added.)

program at Vacaville. It also recomputed appellant's actual custody credit and conduct credit.

The abstract of judgment for the second sentencing hearing incorrectly states that the court imposed consecutive sentences on counts 1 through 4, criminal threats (§ 422), and on counts 5 and 6, false imprisonment (§ 236). The abstract also fails to mention counts 7 through 9. The minute order for the second sentencing hearing is also incorrect, as it states that "the amount of state prison time has not changed."

If there were no other problems, we would simply order a modification of the minute order and abstract of judgment to reflect the actual sentence that was imposed. There are other problems, though.

"An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

Respondent and appellant agree that appellant cannot be separately punished for both criminal threats and false imprisonment, as to the same victim, as the crimes had the same objective. (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525.) Punishment on the four criminal threats counts, counts 1 through 4, is permissible, but counts 5 through 8, which charge false imprisonment of the same four victims, must be stayed pursuant to section 654.

There is also a problem with appellant's conduct credit. The trial court apparently utilized a 15 percent figure to compute conduct credit at the second sentencing hearing, as it awarded appellant 878 days of actual custody credit and 131 days of conduct credit, for a total of 1,009 days of credit. We leave the amount of actual custody credit intact but must recompute the amount of conduct credit.

Pursuant to section 2933.1, the 15 percent rate is used for a defendant who is convicted of one of the violent felonies in section 667.5, subdivision (c). Respondent and appellant agree that appellant's conduct credits cannot be limited to the 15 percent rate, as none of his crimes are named in section 667.5, subdivision (c). Respondent

says that appellant's conduct credits must be recalculated. Appellant gives an actual figure, 364 days, which is derived from the actual custody credit of 730 days that appellant had on September 20, 2007, the date of the first sentencing hearing. Appellant does not seek conduct credit for his period of incarceration between the two sentencing hearings, as the recall of his sentence did not change his postsentence status for the purpose of conduct credits, which will be computed based on prison regulations. (*People v. Johnson* (2004) 32 Cal.4th 260, 263, 267.)

To determine appellant's conduct credits, we utilize the analysis of *In re Marquez* (2003) 30 Cal.4th 14, 25-26. We start with appellant's 730 days of actual custody credit at the first sentencing hearing. We then apply the section 4019 statutory formula to determine appellant's conduct credits. The 730 days of actual custody divided by 4 equals 182.5 (730/4=182.5). We discard the remainder (0.5) and double that number, giving us a total of 364 days (182 x 2) of conduct credit, the same amount proposed by appellant.

To arrive at the total amount of credit (actual custody credit plus conduct credit) in case No. B206138, we add the actual custody credit at the time of the second sentencing hearing (878 days) to the correct amount of conduct credit as of the first sentencing hearing (364 days), leading to a total of 1,242 days (878+364) of total credit for time served.

We therefore conclude that in case No. B206138, the minute order of February 15, 2008, and the abstract of judgment must be corrected and modified to show:

(1) concurrent sentences of 25 years to life on counts 1 through 4;

(2) concurrent sentences of 25 years to life on counts 5 through 8, which are stayed pursuant to section 654;

(3) a consecutive sentence of 25 years to life on count 9;

(4) a 1-year enhancement pursuant to section 667.5, subdivision (b) and a 5-year enhancement pursuant to section 667, subdivision (a)(1);

(5) a total sentence of 50 years to life, plus 6 years;

(6) 878 days of actual custody credit and 364 days of conduct credit, for a total of 1,242 days of credit for time served; and

(7) a recommendation that appellant be housed at California Men's Colony, San Luis Obispo or as an inpatient at Vacaville.

**DISPOSITION**

The abstract of judgment and minute order in case No. B206138 shall be corrected and modified, consistent with this opinion. The clerk of the Los Angeles Superior Court is directed to send a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgments in case Nos. B206138 and B202381 are affirmed.

FLIER, ACTING P. J.

We concur:

BIGELOW, J.

BAUER, J.*

---

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.